Published July 10, 1894.

## Supreme Court Syllabi

The Burrton Land & Town Company vs. Jerome B. Handy, et al. Error from Ellsworth County.

MODIFIED. SYLLABUS. BY THE COURT. HORTON, C. J.

I. The rule is that where property has been included by mistake in a deed which the parties never intended should be conveyed, which the granter was under no legal or moral colliation to convey and which the grantee in good conscience has no right to retain, a court of equity will interfere and correct the mistake.

2. Where a grantee purchased from a granter a fractional eighty acre tract of land subject to the right-of-way of the Union Pacific Railway company, which, under an act of congress, was 400 feet in width, but the parties did not actually know the width of the right-of-way, and the conveyance, without conforming to the intent of the parties, included the right-of-way with covenants of general warranty; Held That the grantor was entitled to have the deed reformed so as to except therefrom the right-of-way to which he had no title.

All the justices concurring. C. L. BROWN, Clerk Supreme Court.

The State of Kansas, ex rel. John T. Little vs. John Spencer. Original Proceeding in Mandamus.

PEREMPTORY WRIT ALLOWED. SYLLABUR. BY THE COURT, HORTON, C. J.

Chap, 229, of the sess, laws of 1889, declaring section lines in Gove and other counties public alghways, is constitutional, as a proper tribunal is constituted by the provisions of the act so that the land owners can claim and receive damages for the land taken for highways. ways.
All the justices concurring.

Clerk Supreme Court. [SHAL]

The State of Kansas vs. William Hoffman. Appeal from Chase County. AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J.

1. An information for grand larceny describing the property taken as four head of "neat cattle" is sufficiently specific.

2. The rule announced in the case of State vs. Cassady, 12 Kas. So, "That the possession of stolen property, recently after it is stolen, is prime fact, evidence of guilt, and if unexplained may be sufficient of itself to warrant a conviction," followed.

3. The evidence in the case examined and held sufficient to support the verdict of guilty and the sentence pronounced thereon.

All the justices concurring.

A true copy.

Attest:

[SEAL] Clark Supreme Court

SYLLABUS. BY THE COURT, HORTON, C. J. raignment.
2. An information may be amended on the trial as to all matters of form at the discretion of the court, when the same can be done without prejudice to the rights of the defend-

thet acts connected with the same transaction indictable, each one of which may be considered as representing a phase in the same offense, and no motion to quash before arraigument is presented, such information is not fatully defective, because they are coupled in the same count.

All the judges concurring.

A true copy.

Attest:

C. J. BROWN,

[SEAL]

Clerk Supreme Court.

The State of Kansas vs. Ben Douglas. Appeal from Republic County. AFFIRMED

1. An information under sec. 42 of the crimes act charging the defendant with having assaulted, maimed, wounded and disfigured with a knife S, is not fatally defective, became the words "maliciously," or "willfelly" are omitted, where the information charges that the defendant did "unlawfully and feloniously" make the assault upon S, and did "feloniously" make the assault upon S, and did "feloniously make the assault upon S, and did 'feloniously make the assault upon S, and did 'feloniously the strail court in charging the jury defines manslughter in the third degree by giving substantially the statutory definition, except omitting the words in the heat of passion, such omission is not prejudicial to the rights of the defendant.

4. A little girl of the age of 9 years, who appears capable of receiving just impressions of the facte respecting which she is examined and of relating them truly is a competent witheass. Her competency may be shown to the court during her examination as a witne .

5. The instructions and evidence 'complained of examined and beid not to be misleading or prejudicial in view of the facts admitted upon the trial by the defendant.

All the justices concurring.

A true copy.

Attest:

(C. J. BROWN, [SEAL] SYLLABUR. BY THE COURT. HORTON, C. J.

C. J. BROWN, Clerk Suprems Court

The State of Kansas vs. F. D. Waugh. Appeal from Cowley County.

AFFIRMED.

SYLLABUR. BY THE COURT. HORTON, C. J.

Such language as the following written and sent through the mail by the plaintiff in an action to a trial judge in a matter still pending to go to you with a body of friends and oreditors to inneress upon you how important it was that I should have the money that was tied up by the garnishment and exact of you a promise to rule in my favor. and exact of you a promise to rule in my favor. and exact of you a promise to rule in my favor. and exact of you a promise to rule in my favor. and exact of you a promise to rule in my favor. and exact of you a promise to rule in my favor. and exact of up by the garnishment and for think it possible that our judge could be so warped by such a procedure as to entirely overlook the interests of a poor man, and thie over him rough shod and decide in favor of a corporation. Will you kindly help me, and inform me what I can do, that I may know that you are not the unjust judge that would not give a poor man the same chance that a brank has, and you will lift a load from my heart? And the most unkind act of all when we had not even had a chance to be heard, was for you to allow the attorney to tax costs—is disrespectful, insulting and contemptuous.

All the justices concurring.

A true copy.

Attest:

C. I. BROWN,

[SEAL]

Clerk Supreme Court.

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of the suntence pronounced thereon.
All the justices concurring.

Clerk Supreme Court.

G.

The State of Kansas vs. Cody Prior.

Appeal from Leavenworth County.

REVERSED.

LLABUS. BY THE COURT. HORTON, C.J.

A motion to quash should precede argrament.

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Rid Co. 47 Kas., 345; Rid. Co. vs. Schroeder.

The State of Kansas vs. Cody Prior.

A motion to quash should precede argrament.

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The state of Kansas vs. Cody Prior.

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A true copy. Attest: [HEAL] C. J. BROWN, Clerk Supreme Court.

Kate Fletcher vs. The City of Ellsworth. Error from Ellsworth County.

REVERSED.

BYTHE COURT. HORTON, C. J. 1. Where there is a celiar way, or opening, seventeen feet and five inches in length and must feet and six inches in depth, on the side of a bailding adjoining an alley open for public travel, and such celiar way, or opening, is all located on and in the alley and not on a lot or private ground, and has no railing, guard or other protection around it, and a person waiking in the alley, upon a dark night, falls therein without any negligence upon his part; Hold, That the city is hable for the injuries sustained thereby.

2. The evidence in this case examined and Hold, That it cannot be said, as a matter of law, upon the facts disclosed that the plaintiff was guilty of such contributory negligence as to prevent any recovery; Hold Junier, That there was sufficient evidence introduced upon the trial in support of the cause of action alleged by the plaintiff togo to the jury.

All the justices concurring.

A true copy.

Clerk Supreme Court.

Clerk Supreme Court.

The City of Eureka vs. L. A. Merrifield and Mary E. Merrifield.

Error from Greenwoo . 2 .. nty. REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J.

1. In the absence of a statute giving an action to the family, or next of kin, for the recovery of damages or loss of services resulting from death, the death of a human being cannot be complained of as an injury.

2. An action to recover damages for injuries resulting in death is maintainable only by the person who is, by the terms of the statute, anthorized to maintain it.

3. Section 420 of the civil code, as construed with sections 122 and 421 A, of the civil code, only permits actions to survive for injury to the person, when death does not result from the injury.

4. When death results from the wrongful act or omission of another, sections 122 and 122 A, of the civil code apply.

5. Under the provisions of sections 122 and 122 A, of the civil code, gen. stat. 1886, before the next of kin of a deceased, whose damath is caused by the wrongful act or omission of another, can maintain an action for damages in the place of the personal representative of the deceased, the petition must allege that the deceased, the petition must allege that the deceased, at the time of his death, was a non-resident of this state, that no personal representative of this state, that no personal representative of his estate has been appointed.

A true copy.

A true copy.

Clerk Supreme Court.

9859. The State of Kansas vs. Isaac G. Reed.

Appeal from Cowley County. REVERSED.

The discharge of a jury before the completion of and where it is shown that the mortgage is and where it is shown that the mortgage is accused, and without sufficient reason, will continue the accused property at the time of the levy of continue trial was begun a juror was reported sick, and where the devotes upon the defendent the trial was begun a juror was reported sick, and where the devotes upon the defendent and where the devotes upon the defendent and a finding made based upon testimony which is not preserved that a discharge was not actual and honest, and that the mortgage was not actual and honest, and that the destroyer was not secured by the actual property of the mortgage.

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BY THE COURT.

I. The discharge of a jury before the completion of that the mortgage was in he actual possession of the mortgage was in he actual possession of the mortgage was not actual and honest, and those it was not good cause for the mortgage of the mortgage of the mortgage of the actual possession of the mortgage was not actual and honest, and the devotes upon the defendent and a finding made based upon testimony which is not preserved that a discharge was not actual and honest, and there was not good cause for the mortgage was not actual and honest, and the mortgage was not actual and honest and honest and honest and honest and honest and the mortgage of the actual possession of the mortgage was not actual and honest and honest and honest and the mortgage was not actual and the mortgage was not actual and the mortgag SYLLABUS. BY THE COURT. JOHNSTON, J

C. J. BROWN, Clark Supreme Court.

State of Kansas vs. Timothy Crow. Appeal from Decatur County. AFFIRMED.

BY THE COURT. JOHNSTON, J. In a prosecution for selling intoxicating liquors without a permit, it is not necessary since the emetment of chapter 149 of the laws of 1850 for the state in the first instance to prove that the party charged did not have a permit to sell intoxicating liquor for the excepted purposes.

All the justices concurring.
A true copy.

Attention of the party charged of the excepted purposes.

C. J. BROWN,

Clerk Supreme Court

State of Kansas vs. C. N. Keys. Appeal from Brown County. AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J. 1. An instruction that "it does not discredit a witness if he should voluntarily appear without the issuance of a subpens" is not prejudicial error, where the jury are also told that they may take into consideration any in terest which the witness might appear to have or any bias, prejudice or unfairness manifested by him.

2. An error in charging the jury which could not have affected the substantial rights of the defendant affords no grounds for a reversal of the indigment.

he judgment.
All the justices concurring.
A true copy.
Attest:
[SEAL] Clerk S C. J. BROWN, Clerk Supreme Court.

In the matter of the application of George Thomas for the writ of habeas corpus. inginal Proceeding in Habeas Corpus.

WRIT DENIED. SYLLARUS. BY THE COURT. JOHNSTON, J.

1. The passage of the prohibitory liquor law by the state legislature does not prevent cities from enacting ordinances providing for the control of the liquor traffic within the limits of such cities.

2. When there is only one subject contend in the body of an ordinance, which is clearly expressed in its this, the fact that such title may contain surplusage will not reader the ordinance obnoxious to that limitation providing And it shall not contain more than one stored which shall be clearly expressed in its title.

3. An ordinance of the city of Lawrence prohibiting and restricting the liquor traffic is examined and held to be valid.

All the justices concurring.

A true copy.

Attest:

[SEAL]

Clerk Supreme Court.

C. J. BROWN, Clerk Supreme Court.

The Contral Kansas Loan & Investment Company, a Corporation. vs. The Chicago Lumber Company, a Partnership. Error from Kingman County.

DISMISSED. SYLLABUS. BY THE COURT, JOHNSTON, J. Where a judgment against several defend-

ants is brought up to the supreme court for review and it appears that a modification or reversal will affect a defendant who has not been made a party the proceeding in error will be dismissed. All the justices concurring.
A true copy.
Attest.
[skal] Clerk S C. J. BROWN, Clerk Supreme Court.

7200: George E. Hasie vs. J. W. Connor, Sheriff. Error from Cowley County. REVERSED.

BY THE COURT. JOHNSTON J 1. In an action of replayin, brought by a mortgages to recover goods attached by the creditors of the mortgagor, who claim that the mortgage is fraudulent and the debt which it purports to secure is not bona fide, and where it is shown that the mortgage is fair on its face, duly recorded, and that the mortgage was in he actual possession of the mortgage was in he actual possession of the attachment, it devolves upon the defendants to show that the debt secured by the mortgage was not actual and honest, and that the mortgages was not actual and honest, and that the mortgages were made for the purpose of delaying and defrauding the creditors of the mortgager.

SYLLARUS. By THE COURT. JOHNSTON, J.

I. A construction train was operating in Missouri, carrying supplies along the line of the railroad. An open car was loaded with coal at a station, and upon the top of the load two smoke stacks were loosely placed, subject to be shaken off by a jerk resulting from the starting or stopping of the train. The duty of loading such cars devolved upon the station, agent made two smokes that cars devolved upon the station, agent made two smokes that of the station agent, to see that open care were properly inspected and prepared to be put into the train for transportation. When the train reached the station, a brakeman was directed to hurry and couple the car ahead of the saffle, so as to get out of the way of a come in the position and looking forward, his back was roward the loose smoke-stacks on top of the coal while he was occupying this place, the engineer carelessiy applied the air brake, checking the speed of the train and jerking the coal car so that the loose smoke-stacks on top of the coal car so that the loose smoke-stacks pushed sheen on the part of the brakeman upon the body, throwing him down under the wheels of the car, whereby he was badly informed the station where the safe that the lary found that the lajary rosalted from the negligence of the company, and not from any want of care on the part of the brakeman was turned over to the trainment for transportation; and those who did prepare and in spect the car he fore it was turned over to the trainment for transportation; and those who did prepare and in spect the car he fore it was turned over to the trainment for transportation; and those who did prepare and in spect the car he fore it was turned over to the trainment for transportation; and those who did prepare and in spect the car he fore it was turned over to the trainment for transportation; and those who did prepare and in spect the car he fore it was turned over to the trainment for transportation; and those who did prepare and in spect the car he fore it

wheels of the car, whereby he was badly injured. There was testimony that he had no knowledge or opportunity to know of the dangerous condition of the car. Upon a trial the jury tound that the injury resulted from the negligence of the company, and not from any want of care on the part of the brakeman. Held, That it was the duly of the company to properly prepare and inspect the car before it was turned over to the trainmen for transportation; and those who did prepare and inspect the same wen not in the same grade of service with the trainmen, and they did not stand as to each other in the relation of fellow servants; and, further, that the company is liable for the negligence and resulting injury.

2. Evidence examined, and held to be sufficient to sustain the verdict of the jury. Alt the justices concurring.

Clerk Supreme Court. The Citizens' National Bank of Kingman vs. George F. Berry & Company.

Error from Kingman County. REVERSED. SYLLABUS. BY THE COURT. ALLEN, J.

The president of a banking corporation has the power to employ and manage the litiga-tion of the bank in the absence of any order of the board of directors depriving him of such All the justices concurring.
A true copy. C. J. BROWN, Czerk Supreme Court

The Citizens' Bank of K'agman vs. J. C. Mc CP and A.

Error from Kingman County. REVERSED.

BY THE COURT.

B. & Co. obtained a judgment against the Cluzens' National bank, of which defendant claims that plaintiff is successor. Under an excoution issued on such judgment, without any proceedings against the Cluzens' bank, plaintiff in this case, the defendant as sheriff seized plaintiff's property to satisfy such judgment, Heid. That such seizure was wrongful. All the justices concurring. C. A. BROWN, Clerk Supreme Court.

7102 Mollue Plow Company vs. P. A. Rodgers and I. C. Cooper. Error from Ness County.

AFFIRMED. SYLLABOR. BY THE COURT. ALLENJ.

i. A vendor who sells and delivers goods at prices and on terms of payment definitely fixed by the contract, but retains the right to elect to take the goods remaining unsold by his vendse as the property of the vendor, is not the owner of the goods until after the actual exercise of such election, and creditors of the vendee who attach such goods prior to any election by the vendor acquire a valid lien thereon.

any election by the vendor acquire a valid lien thereon.

2. Where goods are delivered by the owner to an agent under a contract authorizing the agent to sell and retain all the proceeds over the price fixed in the contract, and also giving the owner the right at the close of the season to require payment from the agent of the price fixed for all goods delivered to him, and where the agent absconds and the property so in his passession is attached by his creditors, if the owner with knowledge of these facts commences an action against the agent for the purchase price of the goods, treating the transaction as a sale, the commencement of such action passes the title to the agent, and will prevent the owner from thereafter maintaining an action to recover the property from the cheriff holding it under write of attachment.

All the justices concurring.

A true copy.

C. J. BROWN, [SEAL]

The State of Kansas vs. Charles Lewin.

Error from Leavenworth County.

AFFIRMED. BY THE COURT.

Section 28, chapter 152, of the laws of 1891, entitled, "An Act in Relation to the State Penitentiary," is void, being in violation, not only of section 16, article 2, of the constitution, but of other constitutional provisions as well.

All the justices concurring.

A true copy.

Attest:

[SEAL]

Clerk Supreme Court.

The Orchard Place Land Company vs. S. M. Lewis.

Error from Wyandotte County. AFFIRMED. BY THE COURT. Where the testimony at the trial is conflict-

where the testimony at the trial is conflicting, and the trial court sets aside the verdict
of the jury and grants a new trial, this courtwill not undertake to weigh the evidence, but
will affirm the order of the lower courtAll the justices concurring.
A true copy.
Attest:
[SEA4]
Clerk Supreme Court.

7160.

Franklin Guess, et al. vs. Lewis M. Briggs, et al.

Error from Atchison County. DISMISSED. BY THE COURT.

SYLLABUR. ALLEN J. In order to revive an action pending in this court on a polition in error, where no consent to such revivor is given, it is necessary that notice of the application shall be served on the adverse party as required by section 42s, of the code, and an order obtained without either consent or notice is a nullity.

All the justices concurring.

A true copy. C. J. BROWN, Clerk Supreme Court.

S. J. Safford, et al. vs. Honor Turner. Error from Butler County. DISMISSED.

Charles Schram, et al. vs. Honor Turner. Error from Butler County. DISMISSED.

STLLABUS. BY THE COURT. ALLEN, J By order of the district court an extension of time to make and serve a case was granted. The order fixed the time for suggesting amendments, and provided for settlement of the case on five days' notice. The record fails to show any amendments suggested. No rotice of the time of settlement was given, and there was no appearance on the part of the defendant. Held, That the petition in error must be dismissed.

C. J. BROWN, Clerk Supreme Court. Attest:

Thomas B. Clement vs. The Wichita & South-western Railway Company.

Error from Sumner County AFFIRMED.

Thomas B. Clement vs. The Wichita & South western Rallway Company. Error from Sumner County. AFFIRMED.

SYLLABUR. BY THE COURT. ALLEN, J. 1. The notice required by paragraph 1395, of the general statutes of 1889, to be given in pro-ceedings to condemn the right-of way for a railroad, may be given and signed by the com-mistioners appointed to make the condemna-

railroad, may be given and signed by the commistioners appointed to make the condemnation.

2. The avaimissioners may properly embody in the report which they file with the county clerk, a statement of their doings with reference to giving notice of the time when they will proceed to lay off the route of the railroad, and such recitals are prima 'acie evidence of the facts therein stated.

2. Recitals in the report of the commissioners appointed to condemn a right-of-way showing the following facts: "Afterwards on the 1st day of July. A. D., 1887, we caused to be published in the summer County Standard, a newspaper published in said summer county, a notice, of which the following is a copy." Fid lowing which is a notice that they will proceed to lay off the route on the sate at the bottom June 28, 1887, and signed by the commissioners, after this comes the following recital, "Which said notice was published for thirty days before the time fixed for proceeding to lay off said route, and afterwards, on, to wit; the 20th day of July. A. D., 1887, at the time and place mentioned in said notice aforesaid, we met, organized, and adjourned to meet at the same place on the 3rd day of Angust, 1887," having been acted upon by the commissioners, as a valid notice, and so construed by the district court, Heid. To show prima facie that thirty days' notice was given as required by the statute.

Alien, J., dissenting.

Horton, G. J., and Johnston, J., concurring.

A true copy.

Attest:

A true copy. Attest: [SEAL] C. J. BROWN, Clerk Supreme Court.

in re J. D. Sims. Original Proceeding in Habens Corpus.

PETITIONER DISCHARGED. BY THE COURT. ALLEN, J Paragraph 2513 of the general statutes of 1889, so far as it attempts to confer on county attorney the power to commit witnesses for contempt on account of a refusal to be sworn, or lestify as provided in this section, is unconstitutional and void.

Horton, C. J., and Johnston, J., concurring specially.

A true copy

Attest:

Cert Spaces County

Clerk Supreme Court. IN THE SUPREME COURT
OF THE STATE OF KANSAR.

1. C. J. Brown, clerk of the supreme court of
the state of Kansas, do hereby certify that the
foregoing are true and correct copies of the
syllabit of the docisions in the above entitled
cases as the same appear on file in my office.
Witness my hand and the seal of the supreme
court, this 9th day of July, 1894.

[SEAL]

C. J. BROWN,
Clerk Supreme Court.

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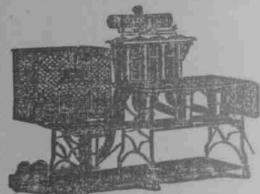


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